A **PATHMANATHAN PARAMASIVAM & ANOR**

v.

PP

B COURT OF APPEAL, PUTRAJAYA
KN SEGARA JCA
SULONG MATJERAIE JCA
AZHAR MA'AH JCA
[CRIMINAL APPEALS NO: P-05-381-2010 & P-05-382-2010]
C 2 MARCH 2012

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking - Conviction and sentence - Appeal against - Whether appellants had custody, control and knowledge of drugs - Whether*
D *appellants found to be in possession of drugs - Whether there was common intention - Drugs found to be in excessive amount - Dangerous Drugs Act 1952, s. 37(da)(iiia) - Whether triggered presumption of trafficking under s. 37(da) Dangerous Drugs Act 1952 - Whether a prima facie case had been made out against appellants - Whether appellants rightly*
E *convicted*

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Trafficking of drugs - Prima facie case - Whether established - Whether appellants had custody, control and knowledge of drugs -*
F *Whether appellants found to be in possession of drugs - Whether there was common intention - Drugs found to be in excessive amount - Dangerous Drugs Act 1952, s. 37(da)(iiia) - Whether triggered presumption of trafficking under s. 37(da) Dangerous Drugs Act 1952 - Whether a prima facie case had been made out against appellants - Whether*
G *appellants rightly convicted*

The appellants were jointly charged with an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 ('the Act') for trafficking in 50.3 grammes of heroin and 7.4 grammes of monoacetylmorphines ("the said drugs") and punishable under
H s. 39B(2) of the same Act with s. 34 of the Penal Code. At the trial, both appellants were found guilty, convicted of the charge and sentenced to death. Hence, this appeal. It was submitted that the Judicial Commissioner in coming to a finding that the prosecution had made out a *prima facie* case, had failed to
I judicially evaluate the evidence and had wrongly found that the appellants had actual possession of the drugs merely by reason that they were seen carrying and receiving respectively the box P9.

According to the appellants, one Obay had requested the second appellant to deliver a wedding present to the first appellant as a gesture to settle amicably an altercation that had occurred between the first appellant and Obay in a club. The second appellant had then gone to Hentian R & R Juru to meet with the first appellant. The second appellant had handed the box to the first appellant and it was at this juncture that they were apprehended and handcuffed. It was the appellants' defence that they had been fixed up by Obay and that they were just innocent carrier and receiver respectively.

Held (dismissing the appeal; upholding conviction and affirming sentence)
Per Azhar Ma'ah JCA delivering the judgment of the court:

(1) Possession through having custody and control - in order to incriminate a person, must be such that the possessor must know the nature of the things possessed (*PP v. Basri Salihin*). In the instant case, SP4 and SP5 had seen the first appellant standing behind the boot of his car as if waiting for someone. According to SP4 and SP5, about ten minutes later, a Perodua Myvi driven by the second appellant approached. The second appellant was seen alighting from the car carrying a box in his left hand and had approached the first appellant. The witnesses saw the second appellant handing over the said box to the first appellant. It was at this juncture that the raiding party closed in and seized the box containing the drugs in question. Some struggle took place during the process of apprehending the appellants. With the aforementioned scenario and events that took place, both the appellants were found to be in actual possession of the drugs in question of which they had custody and control as well as knowledge. There was no valid and cogent reason not to believe these witnesses of truth. (paras 16-18)

(2) The circumstances of the meeting of the two appellants gave rise to some suspicion that they had planned some ungodly act *ie*, to deliver the drugs in question. This evinced their common intention. The evidence adduced by the prosecution before the Judicial Commissioner showed that the two appellants were clearly in possession of the box (P9) and that they had knowledge of the contents of the box. The facts denoted that the said drugs were in their custody and control. The dangerous drugs as per charge were in excess of 15 grammes as provided under s. 37(da)(iiia) of the Act and this would

trigger the presumption of trafficking as provided in s. 37(da) of the Act. Premised upon these facts, the trial judge was correct in finding that a *prima facie* case had been made out against both the appellants. (paras 20-21)

(3) The Judicial Commissioner after considering the evidence as a whole came to a finding that Obay did not exist. The event that was alleged to have taken place at the pub that led to the giving of the so-called present in the form of P9 to the first appellant was a concoction by the defence. After perusing the entire evidence in the proceedings, there was no reason to disagree with the finding of the Judicial Commissioner. As such, the story about Obay and the incident alleged to have taken place at the pub was a mere figment of the appellants' imagination invented for the purpose of the trial. The appellants had failed to rebut the presumption of trafficking as mentioned in the charge. The appellants were thus rightly convicted. (paras 23-25)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu telah dituduh bersama dengan kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') kerana mengedar 50.3 gram heroin dan 7.4 gram monoacetylmorphines ('dadah tersebut') dan boleh dihukum di bawah s. 39B(2) Akta yang sama dengan s. 34 Kanun Keseksaan. Pada masa perbicaraan, kedua-dua perayu didapati bersalah, disabitkan dan dihukum mati. Oleh itu, rayuan ini. Ia dihujahkan bahawa Pesuruhjaya Kehakiman dalam memutuskan bahawa pihak pendakwaan telah membuktikan kes *prima facie*, telah gagal untuk menilai keterangan secara kehakiman dan telah khilaf apabila mendapati perayu-perayu mempunyai milikan sebenar dadah tersebut semata-mata atas sebab mereka dilihat masing-masing membawa dan menerima kotak P9. Menurut perayu-perayu, satu Obay telah meminta perayu kedua menyampaikan hadiah perkahwinan kepada perayu pertama sebagai tanda menyelesaikan secara baik perbalahan yang telah berlaku di antara perayu pertama dan Obay di sebuah kelab. Perayu kedua kemudiannya telah pergi ke Hentian R & R Juru untuk berjumpa dengan perayu pertama. Perayu kedua telah memberi kotak itu kepada perayu pertama dan adalah pada ketika ini mereka ditangkap dan digari. Ia adalah pembelaan perayu-perayu bahawa mereka telah diperalatkan oleh Obay dan mereka hanya masing-masing pembawa dan penerima yang tidak bersalah.

Diputuskan (menolak rayuan; mengekalkan sabitan dan mengesahkan hukuman)
Oleh Azhar Ma'ah HMR menyampaikan penghakiman mahkamah:

(1) Milikan melalui jagaan dan kawalan - untuk menunjukkan bahawa seseorang itu bersalah, pemilik harus berpengetahuan mengenai sifat bahan-bahan yang berada di dalam milikannya (*PP v. Basri Salihin*). Di dalam kes ini, SP4 dan SP5 telah memerhatikan perayu pertama berdiri di bahagian belakang keretanya seperti sedang menunggu seseorang. Menurut SP4 dan SP5, sepuluh minit kemudian, satu Perodua Myvi yang dipandu oleh perayu kedua telah sampai ke tempat itu. Perayu kedua dilihat keluar dari kereta dengan membawa sebuah kotak di dalam tangan kirinya dan telah menghampiri perayu pertama. Saksi-saksi melihat perayu kedua menyerahkan kotak tersebut kepada perayu pertama. Ia adalah pada ketika ini pasukan penyerbu menghampiri mereka dan telah merampas kotak tersebut yang mengandungi dadah-dadah yang dipersoalkan. Satu pergelutan telah berlaku semasa proses penangkapan perayu-perayu. Dengan senario yang disebutkan di atas serta peristiwa-peristiwa yang berlaku, kedua-dua perayu didapati mempunyai milikan sebenar dadah-dadah yang dipersoalkan yang mana mereka mempunyai jagaan, kawalan dan pengetahuan ke atasnya. Tidak terdapat sebab-sebab yang sah dan meyakinkan untuk tidak mempercayai saksi-saksi yang bercakap benar.

(2) Keadaan perjumpaan kedua-dua perayu menimbulkan syak wasangka yang mereka merancang perbuatan yang tidak baik iaitu untuk menyerahkan dadah-dadah yang dipersoalkan. Ini menunjukkan niat bersama mereka. Keterangan yang dikemukakan oleh pihak pendakwaan di hadapan Pesuruhjaya Kehakiman menunjukkan bahawa kedua-dua perayu dengan jelasnya mempunyai milikan ke atas kotak (P9) dan mereka mempunyai pengetahuan mengenai kandungan-kandungan kotak tersebut. Fakta-fakta melambangkan bahawa dadah-dadah tersebut berada di dalam jagaan dan kawalan mereka. Dadah berbahaya yang dipertuduhkan adalah 15 gram berlebihan seperti yang disediakan di bawah s. 37(da)(iiia) Akta dan ini akan mencetuskan anggapan pengedaran seperti yang disediakan di bawah s. 37(da) Akta. Berlandaskan fakta-fakta ini hakim bicara betul apabila mendapati yang satu kes *prima facie* telah dibuktikan terhadap perayu-perayu.

A **(3)** Pesuruhjaya Kehakiman selepas mempertimbangkan keterangan secara keseluruhan memutuskan bahawa Obay tidak wujud sama sekali. Peristiwa yang didakwa telah berlaku di sebuah kelab yang membawa kepada pemberian hadiah dalam bentuk P9 kepada perayu pertama hanyalah satu rekaan oleh pihak
B pembelaan. Selepas meneliti keseluruhan keterangan di dalam prosiding, tiada sebab untuk mahkamah ini tidak bersetuju dengan dapatan Pesuruhjaya Kehakiman. Oleh itu, cerita mengenai Obay dan kejadian yang didakwa berlaku di kelab hanya imaginasi perayu-perayu yang direka bagi tujuan
C perbicaraan. Perayu-perayu telah gagal mematahkan anggapan pengedaran seperti yang disebut di dalam pertuduhan. Perayu-perayu oleh itu telah disabitkan dengan betul.

Case(s) referred to:
D *PP v. Basri Salihin [1993] 1 CLJ 420 HC* ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da)(iiia), 39B(1)(a), (2)
Penal Code, s. 34

E *For the 1st appellant - Dato' Hanif Hashim (Zamri Ibrahim with him); M/s Hanif & Co*
For the 2nd appellant - Datuk K Kumaraendran (Rashidah Mohamed Asharaf with him); M/s Kumar & Co
For the respondent - Siti Rafidah Zainuddin DPP

F *[Appeal from High Court, Pulau Pinang; Criminal Trial No: 45-47-2007]*

Reported by Suhainah Wahiduddin

G
JUDGMENT

Azhar Ma'ah JCA:

[1] Both the appellants were jointly charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act")
H for trafficking in 50.3 grammes of heroin and 7.4 grammes of monoacetylmorphines ("the said drugs") and punishable under s. 39B(2) of the same Act with s. 34 of the Penal Code. At the trial they were found guilty and convicted on the charge and sentenced to death. Hence, this appeal.

I

The Prosecution's Case

[2] The evidence adduced by the prosecution before the High Court as narrated by the learned Judicial Commissioner in the grounds of judgment are as follows:

> Pada 26.2.2007 lebih kurang jam 9.30 malam, Cif Inspektor Rajaram a/l Arumugam (SP4) yang bertugas sebagai Pegawai Operasi dan Siasatan di Bahagian Siasatan Jenayah Narkotik, Ibu Pejabat Polis Kontinjen Pulau Pinang telah mengadakan satu taklimat berkenaan dengan operasi penangkapan kes dadah. Taklimat diadakan di Ibu Pejabat Polis Kontinjen, Pulau Pinang. Taklimat dihadiri oleh Cif Inspektor Santhadas a/l Venugopal (SP5), Detektif Koperal Azali, Detektif Koperal Azahari, Detektif Lans Koperal Azman, Detektif Lans Koperal Mansor dan Detektif Lans Koperal Ganesan.
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> Di dalam taklimat ini, SP4 telah memaklumkan kepada anggota-anggota serbuan, serbuan akan dijalankan di tempat meletak kereta di Hentian Rehat dan Rawat (R&R) Juru, Bukit Mertajam, Pulau Pinang. SP4 juga memaklumkan suspek-suspek kemungkinannya akan menaiki 2 buah kenderaan iaitu kereta jenis Proton Iswara Aeroback dan kereta jenis Perodua Myvi.
>
> SP4 telah membahagikan pasukan serbuan kepada dua. Pasukan pertama terdiri dari SP4, SP5, Lans Koperal Azman dan Detektif Lans Koperal Ganesan yang menaiki sebuah kereta. Pasukan kedua terdiri dari anggota-anggota lain yang menaiki sebuah lagi kereta. Mereka semua berpakaian preman dan menaiki kenderaan pasukan yang tiada lambang polis. Perhubungan di antara pasukan pertama dan pasukan kedua adalah melalui walkie-talkie.
>
> Pada jam 10.15 malam, pasukan serbuan telah bertolak ke Hentian R&R Juru, Bukit Mertajam, Pulau Pinang arah selatan. Pasukan serbuan tiba di sana pada jam lebih kurang 11.00 malam. Setibanya di Hentian R&R Juru arah selatan, pasukan pertama dan pasukan kedua telah mengambil tempat. Kereta yang dinaiki SP4 dan pasukan telah diletakkan di tempat meletak kereta yang ditanda X3 dalam rajah kasar (eksibit P21) manakala kereta pasukan kedua diletakkan di belakang kereta pasukan pertama.
>
> SP4 bersama pasukan pertama dan pasukan kedua telah menunggu di dalam kereta sambil membuat perhatian. Semasa itu enjin kereta telah dimatikan dan tingkap kereta dibuka sedikit.
>
> Pada jam 11.20 malam, SP4 dan SP5 melihat sebuah kereta jenis Proton Iswara Aeroback berwarna kelabu dengan nombor pendaftaran PLF 1046 telah memasuki kawasan Hentian R&R

A Juru arah selatan dan melepasi kereta yang dinaiki SP4 dan pasukan kedua. SP4 melihat kereta tersebut diletakkan di tempat meletak kereta di sebelah kiri kereta yang dinaiki SP4 iaitu di tempat tanda X dalam rajah kasar. Jarak antara kereta yang dinaiki SP4 dan SP5 dan kereta tersebut adalah lebih kurang 7-8 meter.

B Setelah lampu kereta dipadamkan, SP4 dan SP5 melihat seorang lelaki bangsa India keluar dari tempat pemandu dan telah pergi ke bahagian belakang kereta dan berdiri dekat boot kereta. SP4 dan SP5 melihat lelaki tersebut memandangkan ke arah kiri dan kanan seolah-olah menunggu kedatangan seseorang.

C SP4 dan pasukan masih berada di dalam kereta dan saling berhubung dengan pasukan kedua melalui walkie-talkie.

Pada jam lebih kurang 11.30 malam, sebuah kereta Perodua Myvi berwarna perak dengan nombor pendaftaran PGX 3795 dilihat D memasuki Hentian R&R Juru arah selatan dan melepasi kereta yang dinaiki SP4 dan SP5. Kereta tersebut telah berhenti di hujung pembahagi jalan di tempat tanda X2 dalam rajah kasar.

Selepas itu SP4 dan SP5 melihat seorang lelaki telah keluar dari kereta Perodua Myvi tersebut lalu melintas jalan dan menuju ke E arah lelaki yang menunggu dekat boot kereta Proton Iswara Aeroback. Lelaki yang keluar dari kereta Perodua Myvi dilihat sedang memegang sebuah kotak di tangan kirinya.

SP4 melihat lelaki yang memandu kereta Iswara Aeroback telah menoleh dan memandang ke arah pemandu kereta Perodua Myvi. F Apabila mereka bertemu di tempat tanda X1 dalam rajah kasar, pemandu kereta Perodua Myvi telah menyerahkan kotak yang dibawanya kepada pemandu kereta Proton Iswara Aeroback.

Sebaik sahaja penyerahan kotak berlaku, SP4 telah mengarahkan pasukannya dan menghubungi pasukan kedua melalui walkie-talkie G untuk terus menyerbu ke arah kedua-dua lelaki tersebut. SP4 telah menjerit perkataan "Polis" dengan suara yang kuat dan berlari ke arah lelaki-lelaki tersebut.

Menurut SP4, kedua-dua lelaki tersebut dalam keadaan terkejut H semasa SP4 dan pasukan serbuan membuat serbuan. SP4 dan pasukan cuba menahan kedua-dua lelaki tersebut dan telah berlaku pergelutan di antara mereka. Lelaki-lelaki tersebut meronta-ronta cuba untuk melepaskan diri.

SP4 dan seorang anggota serbuan telah berjaya menahan pemandu I kereta Proton Iswara Aeroback yang telah dicamkan sebagai OKT1. SP5 dan seorang anggota serbuan pula telah menahan pemandu kereta Perodua Myvi yang telah dicamkan sebagai OKT2.

SP4 telah merampas kotak (eksibit P12) dari OKT1. Kotak tersebut adalah kotak minuman keras yang terdapat tulisan Chivas Brothers Royal Salute 21 Years Old Scotch Whisky. SP4 telah memeriksa dan membuka kotak tersebut. Di dalamnya terdapat 4 bungkusan kertas suratkhabar yang mengandungi 1 paket plastik lutsinar berisi serbuk dan ketulan kuning disyaki dadah heroin masing-masingnya. Jumlah keseluruhan ada 4 paket plastic lutsinar. Pemeriksaan ini dilakukan di belakang kereta Proton Iswara Aeroback. Semasa pemeriksaan ke atas kotak tersebut. OKT1 dan OKT2 ada berhampiran SP4 sambil dikawal oleh anggota-anggota serbuan.

SP4 telah membuat rampasan ke atas kotak dan isi kandungannya dan memberitahu OKT1 dan OKT2 kesalahan yang telah mereka lakukan dan menangkap mereka.

SP4 juga telah merampas barang-barang peribadi OKT1 dan OKT2 iaitu dompet, kad pengenalan, lessen memandu, wang tunai dan telefon bimbit (eksibit P26, P27, P28, P29 dan eksibit P30).

SP4 seterusnya telah mengarahkan SP5 untuk membuat pemeriksaan ke atas kereta Proton Iswara Aeroback dan kereta Perodua Myvi. Pemeriksaan ke atas kedua-dua kenderaan tidak menjumpai apa-apa barang salah.

SP4 seterusnya telah membawa OKT1 dan OKT2 bersama barang kes dan diikuti pasukan serbuan pergi ke Balai Polis, Bukit Tengah. SP4, SP5, OKT1, OKT2 dan Lans Koperal Azman menaiki kereta pasukan pertama.

Findings Of The Trial Judge

[3] In holding that a *prima facie* case had been made out against both the appellants, the learned Judicial Commissioner gave her reasons as follows:

(i) Isu Pemilikan

Oleh kerana kotak (P12) telah dikendalikan secara fizikal oleh OKT1 dan OKT2 bila mana OKT2 menyerahkan kotak kepada OKT1 di Hentian R&R Juru arah selatan, Mahkamah ini mendapati OKT2 dan OKT1 ada kawalan dan jagaan ke atas kotak tersebut. Dengan itu pemilikan ke atas kotak beserta isi kandungannya dadah yang menjadi subjek pertuduhan adalah pemilikan sebenar (actual possession).

(ii) Isu pengetahuan

Walaupun kotak tersebut dalam keadaan tertutup, ini tidak boleh dijadikan alasan oleh OKT1 dan OKT2 untuk mengatakan mereka tidak tahu mengenal isu kandungan kotak

tersebut. Pengetahuan boleh dibuat secara inferens berdasarkan kelakuan OKT1 dan OKT2 serta keterangan mengikut keadaan kes itu iaitu:

(a) OKT1 dan OKT2 bergelut dengan pasukan serbuan dengan cara meronta-ronta untuk cuba melepaskan diri sebelum mereka ditahan walaupun pasukan serbuan telah memperkenalkan diri sebagai "Polis". Ini menunjukkan OKT1 dan OKT2 tahu mereka ada membawa barang salah.

(b) Perjumpaan OKT1 dan OKT2 di Hentian R&R Juru arah selatan pada 26.2.2007 jam lebih kurang 11.30 malam iaitu waktu hampir lewat malam bukanlah secara kebetulan sebaliknya telah dirancang.

(c) Kotak tersebut tidak diseal atau dibalut, OKT2 yang membawa kotak tersebut boleh membuka kotak dengan mudah untuk melihat isi kandungan kotak tersebut pada bila-bila masa sebelum kotak tersebut diserahkan kepada OKT1.

Oleh yang demikian, Mahkamah ini mendapati OKT1 dan OKT2 mengetahui apa yang terkandung di dalam kotak tersebut. Rujuk kes *Pendakwa Raya lwn. Abdul Rahman Akif (supra)* tersebut.

(iii) Kuantiti Dadah Yang Banyak

Dadah heroin seberat 50.3 gram dan monoacetylmorphines seberat 7.4 gram yang dijumpai di dalam kotak tersebut tidak memungkinkan untuk kegunaan peribadi OKT1 dan OKT2. Oleh kerana dadah yang terlibat adalah melebihi berat minima statutori 15 gram, oleh itu anggapan di bawah seksyen 37(da)(iii a) Akta Dadah Berbahaya 1952 adalah terpakai. Sebagai alternatifnya, perbuatan OKT2 yang membawa kotak berisi dadah dan menyerahkan kepada OKT1 di Hentian R&R Juru arah selatan terjumlah kepada perbuatan mengedar iaitu transporting/carrying sebagaimana yang ditakrifkan di bawah seksyen 2 Akta Dadah Berbahaya 1952. Peruntukan di bawah seksyen 2 Akta Dadah Berbahaya 1952 boleh berdiri dengan sendirinya tanpa bergantung kepada peruntukan di bawah seksyen 39(da)(ii a) Akta Dadah Berbahaya 1952.

(iv) Isu Niat Bersama

OKT1 dan OKT2 telah datang ke Hentian R&R Juru arah selatan dengan dua buah kereta yang berasingan pada tarikh yang sama dan pada jarak waktu yang hampir sama. Dengan berada di Hentian R&R Juru arah selatan pada tarikh dan

waktu yang khusus di mana OKT2 menyerahkan kotak berisi dadah kepada OKT1, menunjukkan OKT1 dan OKT2 memang telah ada persiapan dan perancangan ke arah pengedaran dadah.

(v) Rantaian Keterangan Berhubung Dengan Barang Kes Tidak Terputus

Mahkamah ini berpuas hati dengan keterangan berkaitan dengan identiti barang-barang kes iaitu kotak dan isi kandungan kotak (eksibit P12 hingga P20). Keterangan saksi-saksi pendakwaan saling menyokong di antara satu sama lain. SP3, SP4 dan SP6 dapat mengecam barang-barang kes berdasarkan tandaan, tarikh, tandatangan dan catitan mereka pada barang kes apabila dikemukakan di Mahkamah.

(vi) SP3 (Ahli Kimia) telah menjalankan analisa dan mengesahkan isi kandungan kotak adalah dadah heroin dan monoacetylmorphines seberat 57.7 gram.

Berdasarkan findings ini, Mahkamah ini mendapati pihak pendakwaan telah berjaya membuktikan satu kes *prima facie* terhadap OKT1 dan OKT2. OKT1 dan OKT2 dengan ini dipanggil untuk membela diri.

The Defence Of The Appellants

[4] Upon being ordered by the trial court to enter upon their defence the appellants stated their defence as follows.

[5] By way of background the appellants informed the court that the 1st appellant was about to get married to a Thai girl from Thailand by the name of Chanthana Sodapila (SD4). The wedding ceremony was to take place on 3 March 2007. On 25 February 2007 the 1st appellant went to a drinking joint in Perai known as Mega Hi-Tech Pub to meet the 2nd appellant and the manager of the said pub to deliver wedding invitation cards. Also present at the pub at that time was one by the name of Rayappan, also known as Obay. Obay, on seeing the 1st appellant sarcastically teased the 1st appellant about him marrying the Thai girl. This had offended the 1st appellant and some altercation ensued between them whereby the 2nd appellant and one by the name of Somasundram a/l Rajasegaran (SD3) had to intervene to appease the situation.

[6] The following day Obay met the 2nd appellant at the said pub and informed the 2nd appellant that he would like to settle amicably over the incident that took place between him and the

1st appellant the day before. As token of good gesture Obay requested the 2nd appellant to deliver a wedding present to the 1st appellant. The 2nd appellant agreed.

[7] At about 9.30pm on the same day Obay came to the pub again bringing with him a present that was to be delivered to the 1st appellant through the 2nd appellant. Obay informed the 2nd appellant about this. The 2nd appellant who was then busy at his workplace told Obay to leave the present at the pub counter and he would come and collect it later. At the same time the 2nd appellant contacted the 1st appellant to inform him about the present that the 2nd appellant was supposed to deliver to the 1st appellant. To this end, they agreed to meet at Hentian R&R Juru while the 2nd appellant was on his way home. They agreed to meet at 11.30 that night.

[8] Having collected the said present from the pub at 11 o'clock, the 2nd appellant proceeded to meet the 1st appellant at the appointed place accompanied by SD3. According to the 2nd appellant the present that he collected from the pub was in a box. He or SD3 did not check or examine the contents of the said box but just placed it on the rear seat of his car. Upon arrival at the appointed place the 2nd appellant noticed that the 1st appellant was already waiting and standing outside his car at another spot whilst the 2nd appellant parked his own car close to a Shell petrol station as there was no parking bay available near the 1st appellant's car. Then, SD3 left the car to go to toilet while the 2nd appellant took the present from the rear seat and walked towards the 1st appellant and handed the box to the 1st appellant. At this juncture two Indian males appeared and rushed towards them shouting the word "police". Both the appellant were then apprehended and handcuffed. According to the appellants, they were not given a chance to say anything then.

[9] It was also the 1st appellant's version in his defence that when he went to the appointed place to meet the 2nd appellant to collect the wedding present he was accompanied by his wife to be (SD4) and SD4's friend Som Phan Khamphiwphan (SD5) both of whom at the time of ambush by the raiding party were not at the scene as they had gone to nearby toilets.

[10] To lend credence to the above defence of the appellants, defence also called and adduced evidence from SD3 whose testimony briefly was to support the appellants' claim that there was an incident and altercation between the 1st appellant and

Obay at the pub earlier on. The bottom line of this is that they had been fixed up by Obay and they were just innocent carrier and receiver respectively.

The Appeal

[11] The main, if not the only ground of complaint before us is that the learned Judicial Commissioner in coming to a finding that the prosecution has made out a *prima facie* case, has failed to judicially evaluate the evidence. It was submitted that the learned Judicial Commissioner did not evaluate nor scrutinise the credibility of SP4, SP5 and SPG and other evidence adduced by the prosecution before calling for the appellants to enter upon their defence.

[12] It was submitted further that the learned Judicial Commissioner had wrongly found that the appellants had actual possession of the drugs merely by reason that they were seen carrying and receiving respectively the box P9.

[13] The learned Judicial Commissioner in addressing the aforementioned issues in her judgment had these to say:

> Isu Pemilikan
>
> Oleh kerana kotak (P12) telah dikendalikan secara fizikal oleh OKT1 dan OKT2 bila mana OKT2 menyerahkan kotak kepada OKT1 di Hentian R&R Juru arah selatan, Mahkamah ini mendapati OKT2 dan OKT1 ada kawalan dan jagaan ke atas kotak tersebut. Dengan itu pemilikan ke atas kotak beserta isi kandungannya dadah yang menjadi subjek pertuduhan adalah pemilikan sebenar (actual possession).
>
> Isu Pengetahuan
>
> Walaupun kotak tersebut dalam keadaan tertutup ini tidak boleh dijadikan alasan oleh OKT1 dan OKT2 untuk menyatakan mereka tidak tahu mengenai isi kandungan kotak tersebut. Pengetahuan boleh dibuat secara inferens berdasarkan kelakuan OKT1 dan OKT2 serta keterangan mengikut keadaan kes ini iaitu:
>
> (a) OKT1 dan OKT2 bergelut dengan pasukan serbuan dengan cara meronta-ronta untuk cuba melepaskan diri sebelum mereka ditahan walaupun pasukan serbuan telah memperkenalkan diri sebagai "polis". Ini menunjukkan OKT1 dan OKT2 tahu mereka ada membawa barang salah.

A (b) Perjumpaan OKT1 dan OKT2 di Hentian R&R Juru arah selatan pada 26.2.2007 jam lebih kurang 11.30 malam iaitu waktu hampir lewat malam bukanlah secara kebetulan sebaliknya telah dirancang.

B (c) Kotak tersebut tidak dibalut atau diseal, OKT2 yang membawa kotak tersebut boleh membuka kotak dengan mudah untuk melihat isi kandungan kotak tersebut pada bila-bila masa sebelum kotak tersebut diserahkan kepada OKT1.

Oleh yang demikian, Mahkamah ini mendapati OKT1 dan OKT2 C mengetahui apa yang terkandung di dalam kotak tersebut.

Kuantiti Dadah Yang Banyak

Dadah heroin sebanyak 50.3 gram dan monoacetylmorphines seberat 7.4 gram yang dijumpai di dalam kotak tersebut tidak D memungkinkan untuk kegunaan peribadi OKT1 dan OKT2. Oleh kerana dadah yang terlibat adalah melebihi berat minimum statutory 15 gram, oleh itu anggapan di bawah seksyen 37(da)(iiia) Akta Dadah Berbahaya 1952 adalah terpakai. Sebagai alternatifnya, perbuatan OKT2 yang membawa kotak berisi dadah dan menyerah kepada OKT1 di Hentian R&R Juru arah selatan E terjumlah kepada perbuatan mengedar iaitu "transporting/carrying" sebagaimana yang ditakrifkan di bawah seksyen 2 Akta Dadah Berbahaya 1952. Peruntukan di bawah seksyen 2 Akta Dadah Berbahaya 1952 berdiri dengan sendirinya tanpa bergantung kepada peruntukan di bawah seksyen 39(da)(iiia) Akta Dadah Berbahaya F 1952.

[14] On the point of common intention the learned Judicial Commissioner in her brief analysis on the facts with regard to the issue said these:

G Isu Niat Bersama

OKT1 dan OKT2 telah datang ke Hentian R&R Juru arah selatan dengan dua buah kereta yang berasingan pada tarikh yang sama dan pada jarak waktu yang hampir sama. Dengan berada di Hentian R&R Juru arah selatan pada tarikh dan waktu yang H khusus di mana OKT2 menyerahkan kotak berisi dadah kepada OKT1 menunjukkan OKT1 dan OKT2 memang telah ada persiapan dan perancangan ke arah pengedaran dadah.

[15] Although "possession" is not specifically defined under the I Dangerous Drugs Act 1952, for the purpose of criminal liability it simply means having custody and control combined with evidential or criminal proof of actual knowledge or circumstances clearly and irresistibly pointing to knowledge of the drugs exhibits.

[16] Possession through having control and custody - in order to incriminate a person, must be such that the possessor must know the nature of the things possessed (*PP v. Basri Salihin* [1993] 1 CLJ 420).

[17] In the instant case we have the evidence of SP4 and SP5 who saw the 1st appellant's car approaching the scene of the crime and parked his car 7-8 meters away from the witnesses' car. They saw the 1st appellant standing behind the boot of his car as if waiting for someone. About ten minutes later SP4 and SP5 noticed another car, a Perodua Myvi driven by the 2nd appellant approaching and parked at the end of the parking area. The 2nd appellant was seen alighting from the car and crossing the road over to the 1st appellant's car. At the same time SP4 and SP5 also saw the 2nd appellant carrying a box in his left hand approaching the 1st appellant. Then the witnesses saw the 2nd appellant handing over the said box to the 1st appellant. It was at this juncture that the raiding party decided to close in, and seized the box containing the drugs in question. According to the witnesses some struggle took place during the process of apprehending the two appellants. With the aforementioned scenario and event that took place it is clear to us that both the appellant were in actual possession of the drugs in question of which they have custody and control as well as knowledge.

[18] Although it was submitted on behalf of the appellants that SP4 and SP5 are not witnesses of truth, no reason whatsoever was given for saying so. We on our part could find no valid and cogent reason not to believe these witnesses. We hold them to be witnesses of truth.

[19] It is our view too, that the circumstances of the meeting of the two appellants gave rise to some suspicion that they had planned some ungodly act ie, to deliver the drugs in question. This evinced their common intention.

[20] In the light of the above, we find that the evidence adduced by the prosecution before the learned Judicial Commissioner showed that the two appellants were clearly in possession of the box (P9) and that they had knowledge of the contents of the box. The facts denote that the said drugs were in their custody and control. There was evidence of possession of the drugs independent of s. 37(d) of the Act.

[21] The dangerous drugs as per charge were in excess of 15 grammes as provided under s. 37(da)(iiia) of the Act and this would trigger the presumption of trafficking as provided in s. 37(da) of the Act. Premised upon these facts the learned trial judge was correct in finding that a *prima facie* case has been made out against both the appellant.

The Defence

[22] The learned Judicial Commissioner after hearing evidence from both appellants and three other witnesses decided to reject the defence of the appellants.

[23] Apparently, one of the issues that was addressed by the learned Judicial Commissioner in appraising the defence evidence is the existence of Obay who was alleged to have requested the 2nd appellant to hand over the box P9 to the 1st appellant. The learned Judicial Commissioner after considering the evidence as a whole came to a finding that this Obay did not exist. The event that was alleged to have taken place at the pub that led to the giving of the so-called present in the form of P9 to the 1st appellant was a concoction by the defence. We, on our part after perusing the entire evidence in the proceedings do not find any reason to disagree with the finding of the learned Judicial Commissioner. We find no flaw in her conclusion. As such we hold that the story about Obay and the incident alleged to have taken place at the pub was a mere figment of the appellants' imagination invented for the purpose of the trial.

[24] On minute analysis of the appellants' defence, the learned Judicial Commissioner concluded that the appellants had failed to rebut the presumption of trafficking as mentioned in the charge. We find no reason to disagree with the aforesaid conclusion.

[25] To keep within the limit of our function as the appellate court, we decline to interfere with the findings of facts arrived at by the trial court to which the law entrust the primary task of evaluation of the evidence. In short, the appellants were rightly convicted.

[26] For the above reasons, we dismissed the appeal and uphold the conviction and also affirm the sentence.